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TRIAL — TAKING CASE FROM JURY — DIRECTING VERDICT ON EVIDENCE RAISING A PRESUMPTION SUPPORTING THE BURDEN OF PROOF. — A bailor sued a bailee for negligently injuring a horse hired to the bailee. He introduced evidence that the horse was in good condition when delivered to the bailee and was badly injured when returned, and then rested. The bailee offered no evidence. A motion by the bailor for a directed verdict was refused. The jury returned a verdict for the bailee. *Held*, that judgment be reversed and a new trial granted. *Sheriff Street Stables v. Mandel*, 185 N. Y. Supp. 83.

A bailee for hire is liable for an injury to the property hired due to ordinary negligence. *Buis v. Cook*, 60 Mo. 391. See STORY, BAILMENTS, 9 ed., § 399. By the great weight of authority the burden of establishing negligence rests upon the bailor. *Sanford v. Kimball*, 106 Me. 355, 76 Atl. 890; *Stone v. Case*, 34 Okla. 5, 124 Pac. 960. But where the property is delivered to the bailee in a good condition and is returned damaged, negligence is presumed, thus placing upon the bailee the burden of producing evidence of some other cause of injury. *Davis v. Taylor & Son*, 92 Neb. 769, 139 N. W. 687; *Jackson v. McDonald*, 70 N. J. L. 594, 57 Atl. 126; *Lyons v. Thomas*, 68 N. Y. Supp. 802. See 4 WIGMORE, EVIDENCE, § 2508. It is now well settled that a verdict may be directed for the proponent, *i. e.* the party having the burden of establishing the issue. *North Penn. Railroad v. Commercial Bank*, 123 U. S. 727; *Harding v. Roman Catholic Church*, 113 App. Div. 685, 99 N. Y. Supp. 945, *aff'd* 188 N. Y. 631, 81 N. E. 1165. See 4 WIGMORE, EVIDENCE, § 2495. Where the proponent's evidence clearly establishes the issue and the opposing party offers no evidence, a directed verdict is proper. *Rasch v. Bissell*, 52 Mich. 455, 18 N. W. 216; *Mellon Nat. Bank v. People's Bank*, 226 Pa. St. 261, 75 Atl. 363. The rule should be the same where the proponent produces evidence raising a presumption sustaining the burden of establishing the issue. *Cf. Magoffin v. Missouri Pac. Ry. Co.*, 102 Mo. 540, 15 S. W. 76. See 6 HARV. L. REV. 125, 129. See 4 WIGMORE, EVIDENCE, § 2495. The court was clearly right in holding that there was error. A new trial, however, is an expensive and cumbersome form of relief. The desirable way of correcting such an error is by entering a judgment notwithstanding the verdict. See *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 102 N. E. 665. Under the New York CODE OF CIVIL PROCEDURE, § 1317, however, a new trial must be granted unless it is manifest that no possible proof applicable to the issue would entitle the defeated party to recover. *New v. Village of New Rochelle*, 158 N. Y. 41, 52 N. E. 647.

BOOK REVIEWS

THE LIFE OF JOSEPH HODGES CHOATE. By Edward Sandford Martin. New York: Charles Scribner's Sons. 1920. 2 vols. pp. viii-471; vii-439.

Biographies are of various kinds. There is the philosophical anecdotal form, such as Plutarch's *Lives*, at which Montaigne said "I eternally fill," and concerning which he observed: "Plutarch had rather we should applaud his judgment than commend his knowledge, and had rather leave us an appetite to read more than glutted with that we already read." There is the day-by-day chronicle of a faithful admirer, such as that by which James Boswell made himself almost more famous than Dr. Johnson. There are the biographies written by one who has mastered every detail of the life and time of his subject, absorbed himself with increasing ardor in his personality, and then given such a picture of the man as to create a living personality whom the reader feels he has known and loved (or hated) in actual life. Such is Pro-

fessor Bosworth Smith's *Life of Lord Lawrence of India*, Wm. Roscoe Thayer's *Life of Cavour*, or Albert Beveridge's *Life of Marshall*. Finally, there is the "Life and Letter" type of biography, usually made up shortly after a man's death, under the supervision of his family, by taking such of his letters as they consider prudent at the moment to publish, and stringing them together on a slender thread of narrative, augmented by extracts from speeches and obituary notices or memorials. Such, for example, is the *Life and Letters of John Hay* by Professor Thayer.

The *Life of Joseph H. Choate* "as gathered chiefly from his letters," by the genial editor of *Life*, Mr. Edward S. Martin, is of the last mentioned class. In his introduction Mr. Martin frankly avows that "the reader will promptly discover that this life of Mr. Choate is not so much a biography after the manner of Plutarch, as a compilation." A compilation assuredly it is, with very little comment by the compiler. It would have been made more interesting if Mr. Martin had allowed his charming philosophic mind to play about his subject with comment and characterization. At best, the book will be classed among the *Mémoires pour servir*. Probably it is too soon after Mr. Choate's death to expect any satisfactory story of his life, or appraisal of its value to his generation or to posterity. Mr. Theron G. Strong, a few weeks after Mr. Choate's death, published a sketch,¹ — which presents him more as his friends and contemporaries at the Bar knew him than a layman could do, and which, while superficial, possesses a considerable anecdotal interest.

Mr. Martin's labors, at the outset, were made supremely difficult by placing, as the introduction to his book, Mr. Choate's own captivating autobiography, written, as he records, after "a long confinement to my room and bed, for the first time in more than eighty years!" Unfortunately, Mr. Choate only brought this narrative down to the time of his marriage. It is not surprising that Mr. Martin, after reading this self-told story of Mr. Choate's ancestry and early life, abandoned any idea of attempting a personal interpretation of Mr. Choate's character and achievements, and contented himself with the task of selection and compilation from letters, speeches, and contemporary newspaper comments.

The letters which make up this collection are chiefly domestic in character. Many of them are of such purely temporary and personal interest that one cannot help regarding them as too trivial and unimportant to be employed even as mortar in building a monument to Mr. Choate's career. This comment applies to a number of the letters written in the Nineties (Chap. VI; see particularly pp. 406, 407, 409, 413, 416, 419, 420, 437, 458), as well as to those written from London, while he was Ambassador, to Mrs. Choate and Miss Choate. Yet Mr. Martin tells us that while in London "Mr. Choate was in constant communication with Secretary Hay. In the season when diplomatic business was being transacted, he wrote to him usually with his own hand and often at considerable length, about concerns of government and especially about diplomatic negotiations, first with Lord Salisbury and afterwards with Lord Lansdowne. The letters copied here," says Mr. Martin, "are on subjects of relatively less diplomatic importance than the main part of this correspondence. It should not be inferred from them that the Ambassador's time and thought were chiefly taken up with social matters, addresses and lighter duties. An important mass of correspondence running over six years attests the contrary and shows him as a diligent official, skilled and practised in the law, and in all researches that are connected with it; devoting his talents, his energies, and his acquired knowledge to promoting the causes and the interests of the United States."

¹ "Joseph H. Choate, New Englander, New Yorker, Lawyer, Ambassador." Dodd, Mead & Co., 1917.

This "important mass of correspondence," which Mr. Martin states would have exhibited Mr. Choate in the character of a skilled and useful public servant, is withheld, and we are permitted only to read the personal letters, written, many of them, in haste, at the end of busy days, to wife, daughter, or son, telling of luncheons, dinners; or week-end visits to country houses, — well enough in themselves, but, showing *un héros en pantoufles* rather than the skilled Ambassador, devoting his accumulated wisdom and lawyer's ability to the service of his country in her international relations.

The extracts from Mr. Choate's speeches on various occasions, and the tributes paid him by such men as Mr. Balfour, Lord Bryce, and Mr. Root in the addresses reproduced in this work, together form a picture of Mr. Choate very admirable and very inspiring, but the reader cannot help feeling that a more accurate, instructive, and interesting revelation of the value of Mr. Choate's life would have been made had the editor given less of the purely domestic and social side, and more concerning Mr. Choate's really great work in the New York State Constitutional Convention of 1894, of his services at the Second Hague Peace Conference or before the Behring Sea Arbitration Tribunal and something more of his conduct of the important litigation in which he was engaged at the Bar, and of his official correspondence while Ambassador to London or Delegate to the Hague Conference.

The foundations of Mr. Choate's success in life were laid at Harvard College, where, as he records in his own narrative, the best and happiest period of his life was spent, and at the Harvard Law School, where, while he received very little systematic instruction, he formed an intimate acquaintance with his great kinsman, Rufus Choate, then at the head of the profession in Massachusetts, if not in the whole country. Attendance, during this period, upon the trials in the Supreme Court of Massachusetts, where Rufus Choate, Sidney Bartlett, and Charles G. Loring always were engaged, completed the preliminary education of the young man who, in September, 1855, presented himself at the office of William M. Evarts, in the city of New York, armed with a letter of introduction from Rufus Choate, certifying to his "high reputation for scholarship and all worth," and adding: "There is no young man whom I love better, or from whom I hope more, or as much, and if you can do anything to smooth the way to his first steps the kindness will be most seasonable and will yield all sorts of good fruits." This recommendation was more than justified by the event, and the prophecy was amply fulfilled. For many years the firm of Evarts, Southmayd and Choate stood at the very head of the American Bar, — a unique association of lawyers of extraordinary learning, skill, and character.

Nature was prodigal in her gifts to Mr. Choate. He had a noble face, splendid physique, a sound constitution, a rare capacity for long continued labor, an acute mind, and a voice of extraordinary melodiousness. His portrait, reproduced from a daguerreotype taken at the age of seventeen and prefaced to the first of these volumes, is enthralling in its manly beauty. That despite advancing years he still retained great beauty of feature and majesty of form, is demonstrated by the photograph taken at the age of sixty-six, given in Volume II. To the very end of his life his voice was musical and sonorous — a perfect instrument for his matchless oratorical art.

To all who enjoyed a friendship or even an acquaintance with Mr. Choate, his distinguished success seemed but the normal, the inevitable result of his personality, his character, and his accomplishments. Always he was a hard worker. He never relied upon his ready wit and personal charm for his success. These qualities contributed in large measure to the results he attained, but back of and underlying them were hours of intense application in the study of the facts and the law applicable to every task he undertook. It was only when he had mastered these that he came into court with an easy, self-con-

fidest, calm, and humorous manner, which in itself half won his cases. Good humor was perhaps Mr. Choate's most striking and constant characteristic as a trial lawyer. He never lost his temper.

As Mr. Martin says: "He went through life laughing at a foolish world. His cases were serious to him, in so much as they involved responsibility. If he accepted a trust he was faithful to it. He toiled enormously when labor was necessary. When he made fun it was in the interest of his own case and his own client; but cases of law, though serious, seemed very seldom to be solemn to him."

Other lawyers might be solemn, or vexed, or angry, but Mr. Choate's serene, smiling, half-cynical, and imperturbable nature was a rock upon which most of his opponents broke or were broken.

During his active career at the Bar, until his appointment at the age of sixty-seven to the post of Ambassador to Great Britain, except during the summer vacations, he was almost continuously engaged in the actual trial and arguments of cases in court. This left him no time for scholarly research in or exposition of the law. He was not a jurist, in the sense that Kent and Story and Marshall or Dillon were. He left no legal literary monument to preserve the memory of his achievements at the Bar. He did not pay the customary debt of a lawyer to his profession by writing a work on any legal subject. He was not even an occasional contributor to any law review. His memorial in the active life of his chosen vocation must largely be sought in the recollections of his contemporaries and the traditions which they have preserved and are passing on to the coming generations of lawyers.

A very remarkable review of Mr. Choate's activity during his forty years' practice at the Bar, written by William V. Rowe, for years his associate in practice, printed as a footnote in Volume II, at page 80, gives a vivid picture of the intensity of his labors, the importance and diversity in character of the controversies in which his professional skill was enlisted, the recognition of his ability on the part of the government of his country and the representatives of the greatest property interests. He was employed in cases involving the whole range of law—from testamentary controversies to questions of transportation or concerning patents; from great constitutional questions, such as those involved in the income tax case of 1894, to proceedings before courts martial or international tribunals. In all and every of these he exhibited an easy mastery. As his active professional life was drawing to a close, on the eve of his appointment as Ambassador to Great Britain he answered an interviewer, who inquired of him whether his great successes had brought him content and happiness, by saying: "Constant labor is happiness and success simply means ability to do more labor, — more deeds far reaching in their power and effect. Such success brings as much happiness as the world provides."

Mr. Choate's first conspicuous public service was rendered in the citizen's fight against the Tweed ring in 1871. With great courage and signal ability he threw himself ardently into that contest, and enjoyed the satisfaction of knowing that his services very greatly contributed to driving from power a gang of the most unblushing scoundrels that ever secured control of the government of an American city. He demonstrated the power of the good citizenship of a community when aroused, organized, and intelligently and fearlessly led.

In November, 1893, Mr. Choate was elected one of the delegates-at-large to the Convention called to revise the Constitution of the State of New York. The Convention met at Albany and organized by choosing him as its President. In his opening speech he said it was "a momentous event when the delegates of a State of many millions of people gather together after an interval of almost fifty years, for the purpose of revising and amending the fundamental law of the State." He showed the conservative character of

his mind by declaring that the Convention was not called upon to treat the Constitution "with any rude or sacrilegious hands." The people, he said, had become accustomed to its provisions, and the Convention would be false to its trust if it "entered upon any attempt to tear asunder this structure which, for so many years, has satisfied, in the main, the wants of the people of the State of New York."² The Convention sat for four months. It thoroughly revised the Constitution. There were many hot debates during the period of its labors. Mr. Choate by his calm, imperturbable good nature poured oil on many troubled waters. At times he left the chair and spoke from the floor in support of, or opposition to, measures in which he felt too much interest to remain a mere spectator. In his closing address he thus summed up the character of the results achieved: "We have demonstrated that this, at least, was a conservative convention, mindful of the value of the experience of the past, of the precious value of the institutions which our fathers had handed down to us."³ The Constitution thus framed was submitted to the people and adopted by a majority of upwards of 115,000 votes. Mr. Choate wrote with great satisfaction: "My summer's work has not gone for naught, and instead of perishing in the night, it has now become a part of the history of the State."

Yet only two or three pages of trivial notes are given by Mr. Martin to this very great work of Mr. Choate. Not a single one of the speeches made by him during the life of the Convention is given: speeches such as those he delivered on other formal occasions, in which, as Mr. Root said in his memorial address, "he expressed so clearly the underlying spirit and purpose of the American Bar, he represented with such cogency and command the Bar at its best of real devotion to justice and liberty, that the finest thought and feeling of the profession came to follow him and to look to him as a leader, not merely because he tried causes more skilfully, or argued them more powerfully than others; but also because he put the power and prestige of his great reputation in the court room behind the thrust of advocacy for the honor and public service of the bar as well."

Mr. Choate's *insouciance*, his constant humor, his love of "fun," combined to create the impression that he was not profoundly stirred by great passion, even when other men were deeply moved to righteous indignation. But in the successful proceeding to reverse the court-martial's judgment against Fitz-John Porter, and, above all, in the suit which challenged the constitutionality of the federal income tax law of 1894, he displayed a fervor of conviction and an intensity of advocacy which dispelled any impression of indifference. The conservatism of his nature, which had found expression in his addresses before the New York Constitutional Convention, was thoroughly aroused at a measure which he regarded as violating the fundamental principles of the federal Constitution and as the first step towards populism. He was successful in winning a decision — by a sadly divided court — declaring the law to be unconstitutional, thus postponing until the adoption of the Sixteenth Amendment, in 1912, the exercise by Congress of the power to impose a graduated tax upon incomes, without regard to apportionment among the states in proportion to population — a power which, however much it sometimes may be abused, is now recognized to be essential to enable Congress to meet the growing fiscal requirements of the nation in times of peace and, above all, in the emergencies of war.

In May, 1907, two years after his retirement from the Ambassadorship to London, he was appointed one of the American delegates — the leading delegate — to the Second Hague Peace Conference.

² Lincoln's Const. Hist. of N. Y., Vol. III, p. 24.

³ 3 Lincoln, 677.

Dr. James Brown Scott, in an article quoted by Mr. Martin, says that at the Conference Mr. Choate devoted his energies to the creation of two international tribunals for the interpretation and application of principles of law, — "the International Court of Prize and the Court of Arbitral Justice. Through his timely intervention and conciliatory attitude in the question of the prize court, he was able to adjust apparently irreconcilable differences. . . . But the Prize Court deals with questions arising out of a state of war. It is essential to the ordinary administration of justice between nations that an international tribunal exist for the decision of controversies arising in time of peace . . . therefore Mr. Choate urged upon the Conference, in season as well as out of season, the creation of a truly permanent Court composed of judges 'acting under a sense of judicial responsibility' to quote the happy phraseology of Secretary Root's instructions." After much discussion, a project for such a court was agreed upon, with a recommendation that the court be established when the Powers had agreed, through diplomatic channels, upon a method of appointing the judges.

An effort, led by Mr. Choate, to secure a general treaty of Arbitration, pledging the nations to submit to arbitration differences of a justiciable nature, was less successful. The establishment of an Arbitral Court split upon the rock of the mode of selecting judges. Mr. Choate thus describes it in an address delivered before the University of Pennsylvania upon the occasion of receiving the degree of LL.D. on Washington's Birthday, 1908: "It was upon this last feature that the Conference found itself hopelessly divided — the method that had been unanimously adopted for the Court of Appeal in Prize — for a graded distribution of the judges by years among the different nations, in some proportion to their relative importance, giving to the eight great powers each a judge all the time in the prescribed period of twelve years, and the others, graded periods for eleven years down to one, as in the case of Panama, was now rejected by all the smaller powers, who claimed that as they were equal in sovereignty, and had equal votes in the Conference, they must have an equal judicial voice in this Court of Arbitration. The greater powers could not agree that technical equality of Sovereignty made substantial equality of power, and so this knotty question was left for the powers to settle and establish the Court as I have no doubt they will do in the quieter atmosphere of diplomacy."

Twelve years were to elapse and a great world war to intervene before this prophecy was realized. The "knotty question" has been solved by Elihu Root, the man who, as Secretary of State, drafted the instructions to Mr. Choate and his colleagues at the Hague Conference, by utilizing the machinery established in the Covenant of the League of Nations, and requiring the selection of the judges of the Court of International Justice to be made by the unanimous vote of the Council of the League, in which the preponderance of the "great powers" is recognized, and the Assembly, in which technical Sovereignty is the criterion of action, and every nation, great or small, has the same voice.

On his way home from the Hague Conference, Mr. Choate attended the annual dinner given by the Benchers of the Middle Temple, of whom he was one, to those of the Inner Temple. None of the honors showered upon Mr. Choate during his official life in London had been so highly appreciated by him as his election as one of the Benchers of the Middle Temple. His speech, if he delivered one on that occasion, is not given by Mr. Martin, but at a banquet in his honor at Lincolns Inn given by the Bench and Bar of England, on April 14, 1905, he told the audience that "these ancient Inns of Court, and above all, Westminster Hall with its far more ancient and historic associations, which have been the nurseries and the home of the Common Law for ages, have been very near and dear to my countrymen, and especially to the Bar in America."

He expressed the wish "to acknowledge that infinite debt of gratitude that we owe, that the whole world owes, to the Bench and Bar of England, who have been working out with untiring patience through whole centuries the principles of the Common Law which underlie alike the liberties of England and of America."

These principles he summarized in a paragraph so compact with historical truth and philosophical excellence that it should be read, pondered over, committed to memory, and taken to heart by every American. "That there is no such thing as absolute power, that King, lords and commons, President, Congress and people, are alike subject to the law, that before its supreme majesty all men are equal; that no man can be punished or deprived of his dearest, or any of his rights, except by the edict of the law, pronounced by independent tribunals who are themselves subject to the law; that every man's house is his castle, and though the winds and the storms may enter it, the King and the President cannot. In other words, and the sublime words of the great Sydney, that ours, on both sides of the water, is 'a government of laws and not of men.'"

He pointed out that five of the signers of the Declaration of Independence had been bred to the law in the Middle Temple and three of the framers and signers of the Constitution of the United States in the same Inn, one of whom afterwards was nominated by President Washington to be Chief Justice of the United States, and he added, "So you may well imagine with what delight I was informed a day or two ago that I had been made a Bencher of the great American Inn, the Middle Temple."

The principles of the Common Law and the Anglo-Saxon conception of liberty under law always were close to Mr. Choate's heart.

At the farewell banquet given him by the Lord Mayor of London at the Mansion House, he referred to the delightful personal memories he would carry away with him. But, he added, "I shall carry away something better than that. I shall carry away the highest appreciation of those great traits and qualities which make and mark your national life — the reign of law absolutely sovereign and supreme in all parts of the land; individual liberty carried to its highest perfection, perfected by law and subject to it; that splendid and burning patriotism which inspires your young men when their country calls to risk life and all they hold dear for her sake. . . . I shall carry with me the recollection of that splendid instinct for public life which animates and pervades those classes here from whom public duty is expected, and the absolute purity of your public life which is the necessary result."

With advancing years, Mr. Choate's fervor of conviction respecting policies of government in which he was interested increased. He had outspoken scorn for the effort to exempt American Coastwise Shipping from the payment of tolls in the Panama Canal. He ridiculed the notion that there could be any honest difference of opinion concerning the meaning of the Hay-Pauncefote treaty. "If ever two men," he wrote to the *New York Times*, "deserved the gratitude of their respective nations, and each of the other's nation, those men were John Hay and Lord Pauncefote, perfectly plain, straightforward men who believed that it was their part to say what they meant and to mean what they said, and to express in perfectly clear English what was in their own minds. And when they said that the ships of all nations should have free and equal passage through the canal without any discrimination whatsoever, they meant just that. They lived and died without ever once suspecting that their words were capable of any other meaning than was borne on the face of them."

Mr. Choate followed with growing interest and intensity the events of the great war. In July, 1915, he wrote to his daughter expressing the wish that the President would "end his 'parlez-vous-ing' with the Germans and give them plainly to understand that unless they give a prompt and favorable

answer, our diplomatic relations with them must come to an end." In September of that year, on the occasion of the conferring upon him of the honorary degree of LL.D. by the University of Toronto, he delivered an address, in the course of which he said: "Is it a fact that a century of united labors on the part of all the universities of the world . . . have all been for nothing? Has civilization been thrown to the winds? Has liberty been entirely forgotten? Has justice ceased to be respected among men? . . . Well, by and by peace will come. . . . There is only one thing that can hold civil society together. There is only one rule which can hold the nations of the world together in peace, and that is the law of good faith, and nobody knows it better than the men who are fighting in the trenches on your side and on the other side."

He rejoiced greatly when the United States finally declared war against Germany. "At last," he wrote Lord Grey, "Americans at home and abroad can hold up their heads with infinite pride."

He threw himself unreservedly into the work of organizing the reception of the British and French Missions that arranged to visit this country immediately following the declaration of war. At the reception to the British Mission at the New York City Hall on May 11, 1917, he spoke of America's past doubts and hesitations as to how and when to take the right path. "I feared at one time," he said, "that we might enter into it for some selfish purpose, for the punishment of aggressions against our individual, national, personal rights, for the destruction of American ships or of a few American lives, ample ground for war; but we waited wisely, because we were able at last to enter into this great contest, this great contest of the whole world, for noble and lofty purposes such as never attracted nations before. We are entering it under your lead, sir," — addressing Mr. Balfour — "for the purpose of the vindication of human rights, for the vindication of free government throughout the world, for the establishment by and by — soon, we hope, late, it may be — of a peace which shall endure and not a peace which shall be no peace at all."

He attended all the functions incident to the reception of the visiting Delegations — French and English. Never did he appear more splendid nor speak with greater vigor than at the farewell banquet to the two Missions at the Waldorf-Astoria Hotel on Friday evening, May 11th. He closed his address with a cry to the national administration to hasten to the aid of the Allies. His last words before he sat down were, "And for God's sake, hurry!" On Sunday, May 13th, he attended Divine Service at the Cathedral of St. John the Divine, in company with Mr. Balfour, parting with him after the service with the words, "Remember, we shall meet again to celebrate the Victory." On the evening of the following day he passed away quietly. Death was swallowed up in Victory.

"If at the end of such a life," said Solon to Croesus, "his death be fortunate, this, O King, is the truly happy man. . . . Call no man happy 'till you know the nature of his death; he is at best but fortunate."

Measured by this standard, the life of Joseph H. Choate was indeed a happy one. He had not been spared some sorrow. But he had enjoyed an abundance of prosperity and honor, and he died while his great mental power was yet unabated, his capacity to enjoy and give enjoyment and inspiration undiminished. He was recognized as easily the first citizen of America when he stepped out of life,

"Like one that wraps the drapery of his couch
About him, and lies down to pleasant dreams."

GEORGE W. WICKERSHAM.